STATE OF MICHIGAN

COURT OF APPEALS

STOCK BUILDING SUPPLY LLC,

Plaintiff,

v

STEPHEN ROLLIER, d/b/a ROLLIER CUSTOM HOMES, and ANN ROLLIER,

Defendants-Cross Plaintiffs/Third Party Plaintiffs/Appellees/Cross Appellants,

v

DANIEL ZAWLOCKI,

Defendant-Cross Defendant/Appellant/Cross Appellee,

and

DEPARTMENT OF LABOR AND ECONOMIC GROWTH,

Defendant,

and

DENISE MAXWELL,

Third Party Defendant/Appellant/Cross Appellee.

UNPUBLISHED
November 30, 2006

No. 270144
Genesee Circuit Court
LC No. 04-080022-CH

Before: Wilder, P.J., and Kelly and Borrello, JJ.

PER CURIAM.

Cross-defendant Daniel Zawlocki and third party defendant Denise Maxwell appeal as of right an order granting summary disposition in favor of cross-plaintiffs/third party plaintiffs Stephen and Ann Rollier under MCR 2.116(C)(10). The Rolliers cross-appeal on the grounds that the trial court erred in excluding the portion of the judgment awarding attorney fees in calculating the amount of prejudgment interest under MCL 600.6013(8). We affirm the trial court's order granting summary disposition and reverse and remand for recalculation of the award of prejudgment interest.

I. FACTS AND PROCEDURAL HISTORY

In April 2003, Zawlocki and Maxwell entered into a contract with Stephen Rollier, d/b/a Rollier Custom Homes, under which Rollier[1] was to build a custom home for Zawlocki and Maxwell for the cost of the supplies used in constructing the home plus ten percent. The estimated cost of the home was $623,778. The contract contained the following provision:

> If the Buyer defaults under this agreement, the Builder may, at the Builder's option, pursue all legal and equitable remedies available to the Builder under Michigan law, and the Builder may retain the monies already paid to the Builder as liquidated damages. Buyer shall also be responsible for any and all expenses, costs, and/or attorney fees incurred to recoup and/or reimburse Builder for any and all damages sustained as a result of Buyers[']s default.

In a letter dated April 28, 2004, Zawlocki and Maxwell sent Rollier a termination letter in which they "cancelled" the contract with Rollier, asserting that Rollier lied to them and cheated them "by taking or attempting to take kickbacks from the tradesmen and material suppliers involved with the building of our home."

Rollier had purchased lumber and building supplies for Zawlocki and Maxwell's home from Stock Building Supply. In October 2004, Stock filed a complaint against the Rolliers seeking payment of $10,852.83 for the unpaid balance for supplies that Stock had provided for the construction of Zawlocki and Maxwell's home.[2] Thereafter, the Rolliers filed a cross complaint against Zawlocki and a third party complaint against Maxwell, alleging, among other claims, breach of contract, unjust enrichment, quantum meruit, and judicial foreclosure of a construction lien. On September 22, 2005, the Rolliers moved for summary disposition under MCR 2.116(C)(10) as to all four of the aforementioned counts in their cross complaint against Zawlocki and their third party complaint against Maxwell. Zawlocki and Maxwell argued that summary disposition was not warranted because there was a genuine issue of material fact regarding whether Rollier attempted to commit a fraud against them by asking two of his subcontractors to increase their bills to Zawlocki and Maxwell and then pay him the additional

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[1] References to "Rollier" in this opinion refer to Stephen Rollier.

[2] The lower court record indicates that most, if not all, of this amount was charged by Zawlocki and Maxwell for supplies used in the construction of their home on Rollier's account with Stock. Zawlocki and Maxwell ultimately paid Stock approximately $12,000, and the parties stipulated to dismiss Stock's complaint against the Rolliers.

money. The trial court granted the motion as to all four counts in the Rolliers' cross complaint and third party complaint on the grounds that Zawlocki and Maxwell had no documentary evidence to support their claims of a material factual dispute. The trial court therefore entered a judgment against Zawlocki and Maxwell in the amount of $77,379.27. Of this amount, approximately $16,000 was for services or materials provided in the construction of the home and approximately $61,400 was for attorney fees. Zawlocki and Maxwell thereafter moved for reconsideration, and the trial court denied the motion.

The Rolliers submitted a bill of costs, seeking to recover $9,632.50 in prejudgment interest under MCL 600.6013(8). The trial court awarded the Rolliers prejudgment interest under MCL 600.6013(8) on the portion of the judgment representing the Rolliers' actual losses and costs, but specifically refused to award prejudgment interest on the amount of the judgment representing attorney fees.

II. STANDARD OF REVIEW

We review de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Bd of Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). MCR 2.116(G)(5); *id.* at 626. When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001), citing *Harts v Farmers Ins Exch*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

III. ANALYSIS

Zawlocki and Maxwell argue that the trial court erred in granting the Rolliers' motion for summary disposition. They assert that summary disposition based on MCR 2.116(C)(10) was improper in part because there was a genuine issues of material fact regarding whether Stephen Rollier committed fraud by asking subcontractors Michael Bolton and Matt Henry to inflate their bills and then pay the additional monies paid by Zawlocki and Maxwell back to him in the form of a kickback. We find that Zawlocki and Maxwell failed to establish an issue of material fact regarding this issue. First, regarding Matt Henry, the only evidence presented by Zawlocki and Maxwell was a copy of a cashier's check in the amount of $24,258 to Henry and an excerpt from Stephen Rollier's deposition testimony in which he referenced that check to Henry and another $10,000 payment to Henry, but asserted nothing about an allegedly improper kickback. In addition, they attached to their brief opposing summary disposition a copy of the letter purporting to terminate the construction contract, in which Zawlocki and Maxwell asserted that Rollier was "taking or attempting to take kickbacks from the tradesmen and material suppliers

involved with the building of our home." Such evidence, without more, simply does not establish that Rollier was engaged in a scheme to receive kickbacks from its subcontractors.

As for their claim regarding Michael Bolton, Zawlocki and Maxwell did not attach to their brief opposing the Rolliers' motion for summary disposition an affidavit or deposition of Bolton or any other documentary evidence to support their claims.[3] The only evidence Zawlocki and Maxwell offered to support their claim was the deposition testimony of Maxwell, in which she asserted: "Mr. Bolton told me that [Rollier] had asked him to up his bid on his contract and give him [Rollier] the rest of the money." According to Maxwell, the reason that Rollier did so was because he "wasn't happy with the 10 percent." Maxwell's statement regarding Bolton telling her that Rollier asked Bolton to increase his price and give Rollier the extra money constitutes hearsay under MRE 801 because it was a statement, other than one made by Maxwell while testifying at her deposition, which was offered for its truth. Inadmissible hearsay does not create a genuine issue of fact. *McCallum v Dep't of Corrections*, 197 Mich App 589, 603; 496 NW2d 361 (1992). A party opposing a motion for summary disposition must establish the existence of a material factual dispute with admissible evidence. MCR 2.116(G)(6); *McElhaney v Harper-Hutzel Hosp*, 269 Mich App 488, 497; 711 NW2d 795 (2006). Moreover, while Zawlocki and Maxwell, in their brief opposing the Rolliers' motion for summary disposition, promised to produce the testimony of Bolton at trial, a mere promise to offer factual support at trial is insufficient to withstand a motion for summary disposition. *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 553; 487 NW2d 499 (1992). For these reasons, we agree with the trial court that Zawlocki and Maxwell failed to offer evidence to create an issue of material fact regarding whether Rollier was engaged in a scheme to inflate the bills of its subcontractors and then receive the extra money paid by Zawlocki and Maxwell in the form of a kickback.

Zawlocki and Maxwell also argue that there is a genuine issue of material fact regarding whether the Rolliers were entitled to ten percent of the cost of the windows installed in the home, which would have been approximately $6,600. According to Zawlocki and Maxwell, the trial court erred in awarding the Rolliers ten percent of the cost of the windows in the judgment because they purchased the windows directly from a window supplier after the building contract was terminated. We hold that Zawlocki and Maxwell failed to establish an issue of fact on this issue. In support of their argument, Zawlocki and Maxwell attached to their brief opposing the Rolliers' motion for summary disposition an affidavit signed by Zawlocki in which Zawlocki averred that he and Maxwell negotiated the agreement with the window supplier for acquisition of the windows, that he ordered and paid for the windows, that Maxwell received delivery of the windows at the construction site, that Rollier was not present when the windows were installed

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[3] Zawlocki and Maxwell did attach to their motion for reconsideration the affidavit of Michael Bolton. However, we observe that there is no abuse of discretion in the denial of a motion for reconsideration that rests on testimony that could have presented the first time the issue was argued, *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000), and note that the trial court properly refused to consider the affidavit. Moreover, after reviewing the contents of Bolton's affidavit, we reject Zawlocki and Maxwell's claim that the affidavit supports their claim that Stephen Rollier was attempting to convince Bolton to inflate the price of his services and then kickback any monies paid by Zawlocki and Maxwell to him.

and that he and Rollier agreed that the Rolliers would not receive ten percent of the cost of the windows installed at the home. Mere conclusory allegations in an affidavit are insufficient to create a question of fact. *Hamade v Sunoco, Inc*, 271 Mich App 145, 163; 721 NW2d 233 (2006). Zawlocki's affidavit was the only documentary evidence offered by Zawlocki and Maxwell to support their contention that the Rolliers were not entitled to recover ten percent of the cost of the windows. They did not offer a receipt or an order from the window supplier or any other documentation. In contrast, counsel for the Rolliers, at the hearing on the motion for summary disposition, was prepared to supply the order that Rollier had made for the windows as well as a letter from the window supplier. The order shows that Rollier placed an order for windows for Zawlocki and Maxwell's home on February 27, 2004, which was two months before Zawlocki and Maxwell terminated the construction contract. The letter concerned Rollier's "purchasing windows for the Zawlocki residence" and specifically states that Rollier ordered the windows for Zawlocki's home, that the windows were delivered at the jobsite and received by Rollier, and that a representative of the window supplier walked through the home with Rollier after the windows were installed. Our review of a motion for summary disposition is limited to the evidence that had been presented to the trial court at the time the motion was decided. *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005). While it is not entirely clear whether counsel for the Rolliers physically presented this evidence to the trial court,[4] it is clear that counsel for the Rolliers offered to submit the documents to the trial court on the record at the hearing on the summary disposition motion and it is clear that the trial court considered them and relied on them in rejecting Zawlocki and Maxwell's claim regarding the Rolliers' entitlement to ten percent of the cost of the windows. Therefore, viewing the documentary evidence in a light most favorable to Zawlocki and Maxwell, as the non-moving parties, we find that they have failed to establish a genuine issue of material fact regarding this issue. Although it appears that Zawlocki paid the window supplier directly, this does not establish an issue of material fact regarding whether the Rolliers were entitled to payment of ten percent of the cost of the windows.

On cross-appeal, the Rolliers argue that the trial court erred in refusing to impose prejudgment interest on the portion of the judgment awarding attorney fees pursuant to MCL 600.6013(8). We agree.

We review de novo an award of prejudgment interest under MCL 600.6013. *B & B Investment Group v Gitler*, 229 Mich App 1, 13; 581 NW2d 17 (1998). The prejudgment interest statute is to be construed liberally in favor of the plaintiff. *Id.* The purpose of prejudgment interest is to compensate the prevailing party for expenses incurred in bringing actions for money damages and for any delay in receiving such damages. *Id.*

MCL 600.6013(8) provides:

> Except as otherwise provided in subsections (5) and (7) and subject to subsection (13), for complaints filed on or after January 1, 1987, interest on a money

[4] We were unable to locate these two documents in the lower court record.

> judgment recovered in a civil action is calculated at 6-month intervals from the date of filing the complaint at a rate of interest equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, according to this section. *Interest under this subsection is calculated on the entire amount of the money judgment, including attorney fees and other costs.* The amount of interest attributable to that part of the money judgment from which attorney fees are paid is retained by the plaintiff, and not paid to the plaintiff's attorney. [Emphasis added.]

The statute plainly provides that prejudgment interest applies to "the entire amount of the money judgment, including attorney fees . . . ." MCL 600.6013(8). If the language of a statute is clear and unambiguous, judicial construction is not permitted and the statute must be enforced as written. *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999). In *Ayar v Foodland Distributors*, 472 Mich 713, 716; 698 NW2d 875 (2005), our Supreme Court held that MCL 600.6013(8) is clear and unambiguous. MCL 600.6013(8) makes no exception for attorney fees; to the contrary, it specifically includes them. Because MCL 600.6013(8) clearly and unambiguously requires prejudgment interest to be applied to attorney fees, we hold that the trial court should have ordered prejudgment interest on the entire amount of the money judgment, including attorney fees. We therefore remand for the trial court to award prejudgment interest on the amount of the money judgment relating to attorney fees.

Affirmed, in part, and reversed and remanded, in part. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello